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IN THE
Supreme Court of the United States

OCTOBER TERM, 1947.

No. 437.

TIGHE E. WOODS, Housing Expediter,

—against—

W. H. HILLS.

PETITION FOR REHEARING.

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Dated: New York, June 1, 1948.

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W. H. HILLS.

PETITION FOR REHEARING.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The defendant, W. H. Hills, respectfully presents this, his petition for rehearing in the above entitled cause, by his substituted attorney, Henry N. Rapaport, pursuant to Rule 33 of the Rules of this Court and in support thereof submits the following:

Statement of Grounds.

The grounds for such prayer are in the interests of justice and that the Court did not consider or pass upon a vital provision of statute, the necessary effect of which would be to require a change in the decision and opinion of the Court.

The cause was presented to the Court upon briefs of counsel, and upon oral argument. Nowhere in his

erudite and extended brief filed December 23, 1947 did the Solicitor General make reference to the crucial amendment of Section 204 (e), Emergency Price Control Act,¹ upon which the decision is based, although the statute as amended is purportedly quoted at length (Appendix, pp. 29-41). The Emergency Court of Appeals over a period of nine months after the amendment had been acquiring jurisdiction of rent cases under Section 204 (e); and that learned Court had been passing upon the validity of the Price Administrator's Rent Regulations on appeal by the so-called alternative route, without objection by the Office of Housing Expediter. Counsel is informed that the reference to the July 30, 1947 amendment was first made by the Government in oral argument. Obviously, the Government was not aware of it substantially before.

It is equally obvious, from defendant's original brief and the facts, that his counsel *pro hac vice* was hampered in his presentation by a lack of familiarity with the statute and regulations in meeting this unexpected new point. The Court did not, therefore, have presented before it that complete and studied analysis of the statute to which it is accustomed and which it normally receives.

On the Merits.

The Court's determination that with the Appropriation Act Amendment there abated the authority of the Emergency Court of Appeals to acquire jurisdiction under Section 204 (e) of the Emergency Price

¹ Supplemental Appropriation Act, 1948, approved July 30, 1947, 12 F. R. 2645.

Control Act rests upon the uncontrovertible and literal interpretation of the statute.

The same standard of statutory construction leads inevitably to the conclusion that Congress thereby created a "meaningless anomaly" of Section 204 (d) so far as it applies to this defendant and others in like position.

If, in fact, the relegation of a defendant to the direct Protest route to test the validity of a rent order or regulation were to leave him adequate opportunity for due process via a Court proceeding, there could be no Constitutional objection. If, in fact, a defendant in a rent enforcement case has as much due process protection as was present at the time of the *Yakus* and *Willingham* cases,² then he must pursue his administrative appeal.

The majority opinion in the *Yakus* case stated:

"We have no occasion to decide whether one charged with criminal violations of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face. Nor do we consider whether one who is forced to trial and convicted of violation of a regulation, while diligently seeking determination of its validity by the statutory procedure, may thus be deprived of the defense that the regulation is invalid" (321 U. S. at pp. 446-447).

Mr. Justice Rutledge, dissenting, said:

"The very question, posed in the Court's own

² *Yakus v. U. S.*, 321 U. S. 414; *Bowles v. Willingham*, 321 U. S. 503.

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term, is whether, if they had followed it, the remedy would be adequate constitutionally. It cannot be, under previously accepted ideas, if for one who follows it to a favorable judgment the penalty yet may fall. That question the Court does not decide". (321 U. S. at p. 477).

After the *Yakus* and *Willingham* cases were decided, the Congress, taking note of this Court's significant intimation, and to avoid any possibility of constitutional interdiction, added sub-section (e) to Section 204.³

As Judge Lindley said in *Thomas Paper Stock Company v. Bowles*, 148 Fed. (2d) 831:

"Thus in the Senate Senator Danaher, after directing that body's attention to the fact that in the then recent opinion of *Yakus v. United States*, 321 U. S. 414, the Supreme Court had remarked that it had 'no occasion to decide whether one charged with criminal violation of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face' and that it did not determine 'whether one who is forced to trial and convicted of violation of a regulation, while diligently seeking determination of its validity by the statutory procedure, may thus be deprived of the defense that the regulation is invalid,' said: 'In what we have done we have perfected the two points as to which the Supreme Court has entered no decision, to the end that there can be no question of the denial of or the existence of due process.'"

³ Stabilization Act of 1944, Section 107 (b).

Subsection (e) did more than add an alternative method of testing the validity of an Office of Price Administration regulation or order. It created an exclusive method, which had not theretofore existed.

Prior to the Stabilization Act of 1944, a judgment of the Emergency Court of Appeals invalidating a Price Administrator's order made under Section 204 (a) (after Protest) could be effective to procure the setting aside of a criminal conviction or civil judgment based on such invalid order. That seems clearly to have been the basis of this Court's decisions in the *Yakus* and *Willingham* cases. After Section 204 (e) was added, and amended by Section 6 of Public Law 108, 79th Congress, First Session, 1945, 59 Stat. 308, there could be retroactive effect only if the judgment of the Emergency Court of Appeals complied with Section 204 (e) (2) (iii).⁴

The subsection refers to only two types of cases:

1. Where the Protest was filed before the enforcement action was commenced.
2. Where no Protest was filed; or one was filed after the commencement of the enforcement action, but the objection to the validity of the regulation or order is made in good faith and there is reasonable and substantial excuse for the defendant's failure to present such objection in a Protest filed in accordance with Section 203 (a).

⁴ "Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205 of this Act or section 37 of the Criminal Code; nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206."

In either case, the action must be stayed (in civil cases, only after judgment) until the determination of the Emergency Court of Appeals. It is truly an ancillary proceeding as to the issue of the validity of the rent order or regulation.

150 East 47th Street Corp. v. Porter, 156 Fed. (2d) 541.

But the determination of that issue by some Court of competent jurisdiction, and the right to adequate relief on a favorable decision are the very essence of due process. That is what is now denied.

Since the Congress has now eliminated the second method—leaving unchanged the restriction against retroactive relief—the necessary result is that defendants in rent enforcement actions have no right to an effective day in Court. This is so, even though they may have duly, timely and meticulously followed the statute and Price Administrator's Procedural Regulation in seeking administrative review and even though they are ultimately successful in having the Emergency Court of Appeals declare the rent order or regulation invalid. This follows from the fortuitous circumstance that the enforcement action was commenced first. So, in the instant case, if the present decision stands, it would be futile for defendant to file a Protest. For the trial in the District Court will proceed and he must suffer judgment against him without possibility of stay under the statute. A later decision by the Emergency Court of Appeals can have no effect on that judgment—by the specific provisions of Section 204 (e) (2) (iii).

Since this Court's opinion affects other meritorious cases, they should be considered. On July 26, 1946, a Rent Director issued an order fixing rent on a

summer seasonal apartment. The order purported to be retroactive three years. The owner, claiming to be exempt under the regulation and that the order was invalid and beyond the power of the Rent Director, duly and timely filed a Petition for Review by the Regional Administrator in accordance with Revised Procedural Regulation #3, Section 1300.209⁵ issued by the Price Administrator. The owner did not then protest the regulation involved because other owners had done that (with no final decision from the Emergency Court of Appeals yet). When the Regional Administrator affirmed the order, the owner duly and timely filed a Protest in accordance with Section 1300.221 of the amended Revised Procedural Regulation #3. This procedural regulation, it will be noted, was issued pursuant to Sections 201(d) and 203(a) of the Emergency Price Control Act.⁶

But in the meantime the tenant had commenced action in a state court, and that enforcement court, in November, 1947 (five months after the filing of the Protest), rendered judgment against the owner for treble damages, counsel fees and costs, including the rental paid prior to July 26, 1946. This included the period July 1st to 25th during which, as the Housing Expediter's brief notes (fn. 2, p. 13), "The Emergency Price Control Act of 1942 . . . and the regulations and orders issued thereunder were not currently in effect." It also included a period prior to the issuance of the order as to which the agency now concedes the order could not be effective.

Cf. *Markbreiter v. Woods*, 163 Fed. (2nd) 993.

⁵ Subsequently, as amended February 19, 1947, this became Section 1300.214.

⁶ See good discussion, fn. 6, brief of Solicitor General.

Leave to file a complaint in the Emergency Court of Appeals was granted under Section 204 (e), erroneously as now appears. The Housing Expediter moved to dismiss, *inter alia*, that the Court and the agency should not be compelled to pass twice on the same questions. The owner thereupon withdrew the Protest; and the motion to dismiss the complaint in the Emergency Court of Appeals was denied. Now, on the basis of this Court's decision, that complaint has been dismissed for want of jurisdiction.

Kibrick v. Woods, E. C. A. 460.

So it appears that an ultimately successful conclusion to this owner's Protest, even if permission to reinstate is granted, can have no purpose. For by the terms of the statute there can be no relief from the Emergency Court of Appeals that will affect the judgment.

* * * *

Thus, this rent order defendant has far less protection than he would have had at the time of the *Yakus* and *Willingham* cases. At that time he would have had an adequate and effective judicial hearing. Now, there is a total and absolute denial of due process, the necessary effect of which is to deprive Section 205 (e) (under which enforcement is sought), of constitutional support.

Modification Sought.

Question 1 is therefore academic. If answered at all, it ought to be in the affirmative—not because the District Court may pass on the validity of the Rent Director's order—but because Section 205 (e), being

now invalid as applied to this defendant, there is no cause of action.

In any event, if this answer be deemed improper because the certified question does not directly call for it, at least defendant and others in like position should not be precluded from raising the question of constitutionality by the statement in this Court's opinion.

CONCLUSION.

Wherefore, the defendant respectfully prays that this petition for a rehearing should be granted in the interests of justice.

Respectfully submitted,

W. H. HILLS,
Defendant,

By HENRY N. RAPAPORT,
Counsel for Defendant.

June 1, 1948.

Certificate of Counsel.

I, HENRY N. RAPAPORT, counsel for the defendant, the petitioner herein, do hereby certify that the foregoing petition and application is presented in good faith and not for delay.

HENRY N. RAPAPORT,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

No. 437.—OCTOBER TERM, 1947.

Tighe E. Woods, Housing Expediter,
Petitioner,

v.

W. H. Hills.

On Certificate from
the United States
Court of Appeals
for the Tenth Cir-
cuit.

[May 10, 1948.]

MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

In this case, the Court of Appeals for the Tenth Circuit has certified questions of law concerning which it asks instructions for the proper decision of the cause pending in that court. Judicial Code, § 239; 28 U. S. C. § 346.

The certificate states that this is an action brought by the Administrator for treble damages and for an injunction under § 205 of the Emergency Price Control Act¹ and under the Rent Regulation for Housing.² Hills, the defendant below, remodeled apartments located in a Defense Rental Area, subject to the Rent Regulations, and duly registered them. Thereafter, on December 17, 1943, the maximum rents were reduced by the Area Rent Director pursuant to § 5 (c) of the Regulation; and on March 7, 1945, the Rent Director issued an order further reducing the maximum rents.

On trial in the District Court without a jury, the parties stipulated that the only issue was the validity of the second order. The District Court entered judgment for the defendant on October 29, 1946, holding that the burden was on the Administrator to establish the validity of the second order and that he had failed to introduce proof establishing its validity.

¹ As amended, 50 U. S. C. A. App. §§ 901, 925.

² As amended, 8 F. R. 7322.

At the time the District Court entered its judgment, exclusive jurisdiction to pass on the validity of a regulation or order issued by the Administrator was vested in the Emergency Court of Appeals and in this Court upon review of judgments and orders of the Emergency Court.

§ 204 (d), 50 U. S. C. A. App. § 924 (d). However, the appeal by the Administrator from the judgment of the District Court was not submitted in the Circuit Court of Appeals until September 10, 1947, and the Emergency Price Control Act expired by its terms on June 30, 1947. § 1 (b), 50 U. S. C. A. App. § 901 (b).

The questions certified are as follows:

"(1) On remand, will the District Court of the United States for the District of Kansas, First Division, have jurisdiction to determine the validity of the second rent order and should we direct the District Court to pass on the validity of such rent order?

"(2) If the first question is answered in the negative, does the Emergency Court of Appeals still have jurisdiction to determine the validity of the second rent order?

"(3) If the second question is answered in the affirmative, and this court remands the cause with directions to enter judgment as prayed for against Hills, may Hills, under Sec. 204 (e) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. App., Sec. 924 (e)), apply to the District Court for leave to file in the Emergency Court of Appeals a complaint against the Administrator, setting forth objections to the validity of the second rent order, and, upon proper petition and showing, obtain the relief provided for in Sec. 204 (e), and should we so direct on remand?"

There can be no doubt that the exclusive jurisdiction conferred on the Emergency Court of Appeals by

§ 204 (d)³ precluded the District Court in 1946 from determining the validity of the individual rent order even though the defense to the action brought there was based on the alleged invalidity of the order.⁴

The Emergency Price Control Act was to terminate on June 30, 1947. Section 1 (b), which fixed that date, expressly provides that "as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense." Since the offense complained of in the case at bar occurred before the termination date, § 1 (b) would apply and the Emergency Court of Appeals would still have exclusive jurisdiction to pass on the validity of the second rent order, if additional prerequisites set forth in § 204 (e) (1) of the statute were satisfied.⁵

³" . . . The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provisions of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

⁴ See *Bowles v. Willingham*, 321 U. S. 503, 510-511, 521 (1944); *Yakus v. United States*, 321 U. S. 414 (1944).

⁵ Cf. *150 East 57th Street Corp. v. Porter*, 156 F. 2d 541 (E. C. A., 1946). Moreover, the terms of a 1947 amendment, discussed *infra*, pp. 5-6, clearly show congressional recognition that this exclusive jurisdiction continued after the termination date.

Jurisdiction of the Emergency Court of Appeals over any complaint arises, pursuant to § 204 (e) (1), when the court in which a civil or criminal enforcement proceeding is pending has granted the defendant leave to file in the Emergency Court of Appeals a complaint setting forth objections to the validity of any provision which the defendant is alleged to have violated, and the defendant has duly filed such a complaint. Prior to a 1947 amendment, § 204 (e) (1) provided that "Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 of this Act or section 37 of the Criminal Code, involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection, in a protest filed in accordance with section 203 (a).⁶ Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set

⁶ Section 203 (a) provides *inter alia* for the filing of protests to rent orders issued by the Administrator at any time after issuance. The denial by the Administrator of such a protest is reviewable by a complaint filed in the Emergency Court of Appeals pursuant to § 204 (a).

aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint"

However, the Supplemental Appropriation Act, 1948, approved July 30, 1947, amended § 204 (e) by striking out the first sentence of the foregoing provision and substituting the following: "Within sixty days after the date of enactment of this amendment, or within sixty days after arraignment in any criminal proceedings and within sixty days after commencement of any civil proceedings brought pursuant to section 205 of this Act or section 37 of the Criminal Code, involving alleged violation of any provision of any regulation or order issued under section 2 or alleged violation of any price schedule effective in accordance with the provisions of section 206 with respect to which responsibility was transferred to the Department of Commerce by Executive Order 9841, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate."

Since responsibility for functions with respect to rent control was transferred by Executive Order 9841 to the Housing Expediter rather than to the Department of Commerce, the necessary effect of the foregoing amendment is to eliminate entirely the statutory right the defendant in the present case previously had to apply to the District Court for leave to file a complaint in the Emergency Court of Appeals. As a corollary, the latter court can no longer acquire jurisdiction pursuant to § 204 (e) over any complaint which defendant may desire to file with it to contest the validity of the second rent order.

¹ 12 F. R. 2645.

We may now consider what effect the 1947 amendment, thus viewed, has upon the "exclusive jurisdiction" provision in § 204 (d), which was preserved by the saving clause of § 1 (b). If elimination of the complaint procedure of § 204 (e) as a remedy for those seeking to challenge rent orders meant the elimination of all provision for review by the Emergency Court of Appeals, it might be argued that preservation of the ban imposed by § 204 (d) on district court adjudication of the validity of rent orders would be a denial of due process to a defendant charged with a violation of an order.

However, the 1947 amendment left unimpaired the provision in § 203 (a) for review of rent orders by filing protests with the Administrator (i. e., the Housing Expediter, as transferee of the Administrator's rent control functions). A denial of such a protest may be reviewed in the Emergency Court of Appeals by filing a complaint pursuant to § 204 (a). Prior to an amendment added by the Stabilization Extension Act of 1944, protests could be filed under § 203 (a) only within a period of sixty days after the issuance of the regulation or order sought to be challenged. Under the 1944 amendment, which is preserved unchanged for rent orders, this period was extended so that protests can be filed "At any time after the issuance" of the regulation or order, although the 1947 amendment expressly takes cognizance of the right of the United States or any officer thereof to dismiss any protest under § 203 on the ground of laches.*

Thus, it appears that the Emergency Court of Appeals may still be able to acquire jurisdiction to review rent orders, issued under the Price Control Act, by means

* " . . . Nothing herein shall be construed as in any way affecting the right of the United States or any officer thereof to dismiss any protest under section 203 of the Emergency Price Control Act of 1942, as amended, or defend against any complaint under section 204 (e) of such Act on the ground of laches."

of the protest and complaint procedure of §§ 203 (a) and 204 (a). Accordingly, the exclusive jurisdiction provision in § 204 (d) is not a meaningless anomaly so far as review of rent control orders is concerned, and it remains as substantial a barrier to review of the second rent order by the District Court as it was held to be in *Yakus v. United States*, 321 U. S. 414 (1944). There this Court ruled that defendants could not attack the validity of price regulations in a prosecution in a District Court even though the Emergency Price Control Act as then drawn made no provision for review by the complaint procedure later set up under § 204 (e) (and now abandoned so far as rent orders are concerned). The only judicial review then available required as a preliminary the filing of a protest to the Administrator under § 203 (a) within sixty days after the promulgation of the order or regulation. That statutory review procedure, whose constitutionality was upheld in the *Yakus* case, is still preserved to defendants charged with violations of rent orders issued under the Emergency Price Control Act of 1942.⁹ If anything, the judicial review still available to such defendants is even broader than the procedure sustained in the *Yakus* case, since the sixty-day limitation on the filing of protests no longer applies to rent orders.

In view of the foregoing, we answer question (1) in the negative. In answer to question (2), the Emergency Court of Appeals no longer has jurisdiction pursuant to § 204 (e) to determine the validity of the second rent order.

⁹Of course the District Court can withhold judgment so that it may give effect to any determination by the Housing Expediter or the Emergency Court of Appeals that might result from the defendant's pursuit of this remedy.